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# RAPE AS A FORM OF TORTURE: THE EXPERIENCE OF THE COMMITTEE AGAINST TORTURE

*Felice D. Gaer*†

## RECOGNIZING A SILENCE

Since the late 1980s, Professor Rhonda Copelon provided intellectual leadership in the evolution of the norm of torture and the recognition of its negative gendered origins, as well as ways to address this more positively. Working through and with the International Women's Human Rights Clinic ("IWHRC") at City University of New York ("CUNY") School of Law, as well as with activists and advocates worldwide, she saw and explained to others how the issues of domestic violence and rape had been wrongly isolated from the human rights normative framework. They were not seen as violence, she explained, but as personal and private matters, which were not embraced within the international legal discourse, as their discriminatory nature was also invisible. She engaged in effective advocacy that helped develop the legal avenues through which to address these matters in ways that have profoundly influenced the discourse as well as international legal mechanisms.<sup>1</sup>

These remarks recap the recognition of rape as a form of torture by several international human rights mechanisms and discuss in particular how the Committee Against Torture has continued to address the issue since the adoption of its General Comment No. 2 in November 2007.

## BREAKING THE SILENCE

In 1986, recognition by United Nations Special Rapporteur on Torture, Peter Kooijmans, that rape in prison should be regarded as torture,<sup>2</sup> opened the door to discussion and codification of

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<sup>1</sup> See Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291 (1994); Rhonda Copelon, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229 (2008).

<sup>2</sup> See Special Rapporteur on Torture, *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Comm'n on Human Rights, U.N. Doc. E/CN.4/1986/15, ¶ 119 (1986) (by Peter Kooijmans) [hereinafter Kooijmans, *Report on Torture*].

norms on a subject that had previously been ignored, despite the years of U.N. proscription of torture and ill treatment. Indeed, even at the 1980 Copenhagen World Conference on Women, where the broad issue of violence against women was at long last raised, albeit timidly, in the context of the U.N.'s separate programs dealing with the status of women, the issue of rape and other violence against women was presented not as a human rights issue, nor as a matter of discrimination, but rather as an issue of women's health.<sup>3</sup> Kooijmans offered recognition that rape was one of a long list of techniques used against detainees constituting torture.<sup>4</sup>

While the reference to rape by the Special Rapporteur on Torture was considered a breakthrough at the international level in addressing rape, Kooijmans did not address violence against women more broadly. Rape was simply one of many techniques used in the jail cell, either for extracting confessions or humiliating prisoners.<sup>5</sup> Kooijmans nonetheless helped women's rights activists to push forward. Having previously achieved adoption of the 1979 Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), they began to press effectively for recognition of women's rights as human rights. That acknowledgment came later in the 1993 Vienna Declaration and Programme of Action of the World Conference on Human Rights<sup>6</sup> and the 1995 Beijing Declaration and Platform for Action of the Fourth World Conference on Women.<sup>7</sup>

#### A SEA CHANGE

After this recognition of rape as a form of violence, and of violence against women as a form of discrimination, a key goal, according to Rhonda Copelon, was finding ways to move away from treating torture in a gender discriminatory context into a gender inclusive one. Among the key achievements that followed were the recognition of rape and sexual violence as torture in international criminal law regarding war crimes tribunals; the acknowledgment

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<sup>3</sup> Felice D. Gaer, *Women, International Law and International Institutions*, 32 WOMEN'S STUDIES INT'L FORUM 60, 63 (2009).

<sup>4</sup> See Kooijmans, *Report on Torture*, *supra* note 2, ¶ 119.

<sup>5</sup> See Kooijmans, *Report on Torture*, *supra* note 2, ¶ 119.

<sup>6</sup> See World Conference on Human Rights, June 14–15, 1993, *Vienna Declaration and Programme for Action*, ¶¶ 36–44, U.N. Doc. A/CONF.157/23 (July 12, 1993).

<sup>7</sup> See generally Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

of rape as abuse in the conclusions of U.N. treaty bodies and independent special rapporteurs; and the adoption of General Comment No. 2 of the Committee Against Torture,<sup>8</sup> which explicitly discusses rape and gender-based violence in the context of the Convention Against Torture (“CAT”).

As discussions began on whether to create an international criminal tribunal to address the responsibility of individual perpetrators in the Yugoslav conflict, the issue of whether rape was a war crime was raised, debated, and successfully included in the draft and final statutes of the Yugoslav war crimes tribunal.

Rhonda Copelon and other NGO experts successfully pursued the issue of gender violence as torture at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda, as well as in the negotiations on the Rome Statute of the International Criminal Court. Gender-based crimes were included in the statutes and some successful prosecutions followed. Notably, in *Prosecutor v. Kunarac*,<sup>9</sup> known as the Foca judgment, the ICTY Appeals Chamber held that the numerous rapes of Bosnian Muslim women in both Bosnian Serb private homes and detention centers constituted torture, and the accused were convicted for rape, enslavement, and inhumane acts. Thereafter, as the former legal advisor to the ICTY prosecutor, Patricia Viseur Sellers, has described it, the *Kunarac* trial chamber “held that humanitarian law eschewed an element of State or official capacity or acquiescence or consent of official capacity.”<sup>10</sup>

In the Committee Against Torture and the Human Rights Committee, and in consultations with the special rapporteurs, Rhonda Copelon and the IWHR Clinic also pressed for recognition of the gravity of officially inflicted sexualized violence as well as privately inflicted gender violence where the state does not intervene to exercise due diligence to prevent it. Subjects raised in these NGO submissions ranged from the sexualized abuses of women detainees at Abu Ghraib prison to coerced interrogation of women seeking medical services for incomplete and life-threatening abortions in Chile.

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<sup>8</sup> See Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) [hereinafter General Comment No. 2].

<sup>9</sup> See *Prosecutor v. Kunarac*, No. IT-96-23/1-T (Int’l Crim. Trib. For the Former Yugoslavia Feb. 22, 2001), available at <http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf>.

<sup>10</sup> Patricia Viseur Sellers, *Sexual Torture As A Crime Under International Criminal and Humanitarian Law*, 11 N.Y. CITY L. REV. 339, 348 (2008).

The results of such information-based advocacy from NGOs were impressive: the Committee Against Torture identified such practices to be concerns under the Torture Convention in the process of discussing and adopting General Comment No. 2. The Human Rights Committee also recognized gender-based violence as torture or ill treatment.

The Committee Against Torture examined the issue further in its process of adopting General Comment No. 2 on the Prevention of Torture. Numerous experts, NGOs, and national human rights institutions offered advice and comments prior to finalization of General Comment No. 2. A year later, the then-*New York City Law Review* devoted a symposium to General Comment No. 2 so that its path breaking and inclusive character could begin to be understood, particularly with regard to gender-based violence.

In 2008, the Special Rapporteur on Torture published an extensive report on Gender and Torture that lent further weight to understanding torture as encompassing many forms of gender violence, for which both official and non-state actors are responsible.

#### TORTURE AND ACTIONS OF PRIVATE INDIVIDUALS

As Committee members have reminded States parties with inadequate definitions of torture, there is a difference between naming and prosecuting conduct as “aggravated assault” or “abuse of power,” and identifying it as torture. A key outcome of General Comment No. 2 was thus to include and name rape as a form of torture.

The reasons for naming and defining the crime of torture apply generally, and equally strongly, to the phenomenon of rape: defining the crime will alert everyone to the special gravity of torture, and the need to strengthen deterrent measures; and will assist the Committee as well as empower the public to monitor and challenge state action.<sup>11</sup> General Comment No. 2 emphasizes the legal responsibility of those in the chain of command as well as the direct perpetrators, including by acts of instigation, consent, or acquiescence.

By focusing on the obligation to prevent torture, the CAT reminds each State party to “closely monitor its officials and those acting on its behalf,” to report to the Committee on any incidents prohibited by the CAT, and to investigate, punish, and prevent further incidents. General Comment No. 2 also reminds everyone of

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<sup>11</sup> General Comment No. 2, *supra* note 8, ¶ 11.

the CAT's applicability to all persons under the state's control or custody.

General Comment No. 2 further emphasizes how broadly the word "all" extends by referring explicitly to an array of institutions, locations, and actors. It actually lists a number of venues of custody or control, including prisons, hospitals, schools, institutions that care for children, the aged, the mentally ill or disabled, and military institutions. States are reminded that they have obligations with regard to the acts of state agents, private contractors, and others acting in official capacity or on behalf of the state or under its direction or control. General Comment No. 2 further points out "contexts where the failure of the state to intervene encourages and enhances the danger of privately inflicted harm."<sup>12</sup>

The obligation of the State party to prevent torture necessarily extends to identifying and assigning responsibility for impermissible acts by non-state or private actors. Such acts are covered if a state fails to exercise due diligence.

As suggested above, there have been ongoing discussions over whether acts committed by private individuals ever trigger state responsibility under the CAT. The jurisprudence of the Committee, and other international bodies, makes it clear that there is indeed an array of circumstances in which the acts of private individuals triggers state responsibility for torture or ill treatment under the CAT. Measures needed to ensure due diligence have been defined repeatedly by U.N. experts and authoritative bodies working on issues of violence against women, including rape.

Importantly, General Comment No. 2 expresses concern about situations "where the state authorities or others . . . know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-state officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute, and punish." Such inaction even can be understood to constitute a form of encouragement or de facto permission.<sup>13</sup>

Under the CAT's article 2, States parties have an obligation to "take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." On the basis of a plain reading, this must surely include measures to ensure that there is no acquiescence in such acts of torture carried out by non-state actors for purposes of "discrimination of any

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<sup>12</sup> Id. ¶ 15.

<sup>13</sup> Id. ¶ 18.

kind,” as set out in the CAT’s article 1, including violence against women.

The significance of this point becomes even clearer when understood in the context of article 2(1) of the CAT, which clearly requires that “[e]ach State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.” The emphasis of this article is thus not on an optional obligation or even an “appropriate” form of action; it requires that the measures taken by States parties to prevent torture must in fact be effective. This means that results accomplished will be the standard for judgments on compliance, not a State party’s aspirations. It further implies that it must include measures to ensure that there is no acquiescence in such acts when carried out by non-state actors. In a commentary to the CEDAW Convention’s article 2, Andrew Byrnes has argued the CEDAW Convention’s requirement calling on States parties “to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise” carries obligations of result as well. Looking at both of these together, taking “effective measures” under the CAT must be at least as demanding as an obligation under the CEDAW to take “all appropriate measures.”<sup>14</sup>

One of the panelists at this Symposium argued that, however “torturous” the act of rape might be to the victim, the action has to be directly committed by or acquiesced to by a public official for it to be considered torture under the Convention. He stated it was rare that steps by a government official failing to take due diligence can be called a violation of human rights. He nonetheless urged states to take measures not to neglect the serious matters of domestic violence, and, indeed, acknowledged that they should exercise due diligence in order to protect people. But his argument raises the question of whether “failure to prevent” constitutes a breach of the Convention, and what constitutes an appropriate due diligence standard as applied regarding violence against women. It further draws our attention to how such a standard can be applied with regard to the acts by private persons committing the abuse of rape.

There is a considerable body of law, practice, and international legal opinion on the elements of due diligence expected in cases of violence against women, all the more so because such vio-

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<sup>14</sup> Andrew C. Byrnes & Marsha Freeman, *The Impact of the CEDAW Convention: Paths to Equality*, (UNSW Law Research Paper No. 2012-7, 2012), available at <http://ssrn.com/abstract=2011655>.

lence is understood to be a form of discrimination against women.<sup>15</sup> Since the CAT identifies “discrimination of any kind” as one of the four purposive elements required for an act to constitute torture, acts of violence against women must be understood in a context of discrimination, and when they are perpetrated, they take on a character that rises above any mere individual criminal action.

U.N. Special Rapporteur on Violence Against Women, Yakin Ertürk, summarized international thinking on the issue of due diligence standards thusly:

The due diligence standard has been crucial in developing state responsibility for violence perpetrated by private actors in the public and private arenas. It imposes upon the state the responsibility for illegal acts that are not directly committed by the State or its agents but by private actors on account of State failure to take sufficient steps to prevent the illegal acts from occurring. Likewise, once an illegal act has occurred, the State’s inaction and failure to investigate prosecute or punish the act perpetrated by a private actor amounts to neglect of the State obligation to be duly diligent. The due diligence standard has long been part of international law . . . placing upon the state the duty to prevent, investigate, punish, and provide compensation for all acts of VAW wherever they may occur.<sup>16</sup>

Ertürk points out that there are positive expectations of measures to be taken by each State party including ratifying relevant treaties, enacting special legislation, and ensuring positive action by the state:

through policies, programmes, creation of special mechanisms such as ombudspersons commissions, public education campaigns, sensitization of agencies engage . . . or collection of data to assess the de facto status of the problem. Protection requires the State to establish or promote institutional arrangements that provide services vital to respond to VAW, such as counseling, shelter, healthcare, crisis support, restraining orders, and finan-

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<sup>15</sup> See generally Robert Perry Barnidge, *The Due Diligence Principle Under International Law*, 8 INT’L CMTY. L. REV. 1 (2006), for discussion of the standards required for due diligence regarding violence against women. See also DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE (C. Benninger-Budel ed., 2008); *Opuz v. Turkey*, App. No. 33401/02, (Eur. Ct. H.R. 2009); *Maria da Penha Maia Fernandes v. Brazil*, Case 12.051, Inter-Am. Comm’n H.R., Report No. 54/01, ¶ 56 (2001); *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988).

<sup>16</sup> Special Rapporteur on Violence Against Women, its Causes and Consequences, *15 Years of the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences (1994–2009): A Critical Review*, ¶ 66, U.N. Doc. A/HRC/11/6/Add.5 (May 27, 2009) (by Yakin Ertürk).



cial aid . . . . Punishment is measured in terms of action taken . . . in relation to investigating and prosecuting cases of violence or abuse.<sup>17</sup>

Earlier, Professor Copelon had demonstrated the gender-biased elements of the CAT's definition of torture, including how it draws inappropriate, gendered distinctions between private and public space. General Recommendation 19 of the CEDAW Committee defined gender violence as a form of discrimination against women,<sup>18</sup> helping re-conceptualize violence against women from a gender perspective.<sup>19</sup> Copelon wrote that domestic violence had to be understood "as a system of psychological and physical control" that could amount to torture. And she commented on the relevance of the CAT Committee's General Comment: "That this understanding has gained official recognition in General Comment No. 2 is thus particularly thrilling as I believe unveiling gender violence as torture is critical to eliminating discrimination in the norm of torture . . . emphasizing the urgency of concerted and effective prevention . . . and empowering the survivors."<sup>20</sup>

The CEDAW Committee's General Recommendation 28 recalls that the definition of discrimination in the women's convention addresses both purpose and effect of the discriminatory treatment.<sup>21</sup> In fact, General Recommendation 28 points out that CEDAW's prohibition on discrimination "would mean that identical or neutral treatment of women and men might constitute discrimination against women if such treatment resulted in or had the effect of women being denied the exercise of a right because there

<sup>17</sup> *Id.* ¶ 67.

<sup>18</sup> Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, Violence Against Women, U.N. Doc. A/47/38 (1992).

<sup>19</sup> Rhonda Copelon, *Gender Violence As Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. CITY L. REV. 229, 238-39 (2008).

<sup>20</sup> *Id.* at 233.

<sup>21</sup> Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28, The Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/GC/28 (Dec. 16, 2010) [hereinafter General Recommendation No. 28]; Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (1984) (explicitly referencing discrimination against women as "any distinction, exclusion or restriction which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of human rights and fundamental freedoms," thus recognizing discrimination against women may result even where an act of discrimination was not intended). *See also* Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (referencing "discrimination of any kind" as a purposive element of torture, surely included all forms of discrimination, including gender-based discrimination).

was no recognition of the pre-existing gender-based disadvantage and inequality that women face.”<sup>22</sup> General Recommendation 28 recalls that:

States parties have an obligation not to cause discrimination against women through acts or omissions; they are further obliged to react actively against discrimination against women, regardless of whether such acts or omissions are perpetrated by the State or by private actors. Discrimination can occur through the failure of States to take necessary legislative measures to ensure the full realization of women’s rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws.<sup>23</sup>

Further, paragraph 13 of the General Recommendation states that:

Article 2 is not limited to the prohibition of discrimination against women caused directly or indirectly by States parties. Article 2 also imposes a due diligence obligation on States parties to prevent discrimination by private actors. In some cases, a private actor’s acts or omission of acts may be attributed to the State under international law. States parties are thus obliged to ensure that private actors do not engage in discrimination against women as defined in the Convention. The appropriate measures that States parties are obliged to take include the regulation of the activities of private actors with regard to education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing.<sup>24</sup>

In paragraph 19, the CEDAW Committee’s General Recommendation 28 repeats that “States parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender-based violence.”<sup>25</sup>

In assessing the matter of state responsibility concerning acts of rape that fall under the broader category of torture and violence against women, it seems clear that private acts of rape can indeed constitute torture under the CAT, if due diligence is not applied, and such diligence requires, *inter alia*, examining the nature of a State party’s actions to prevent, prosecute, investigate, punish, and provide reparation. General Comment No. 2 states this directly. Using such a due diligence standard, it is simply inadequate to argue that the State party’s authority must exhibit direct acquiescence to

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<sup>22</sup> General Recommendation No. 28, *supra* note 21, ¶ 5.

<sup>23</sup> *Id.* ¶ 10.

<sup>24</sup> *Id.* ¶ 13.

<sup>25</sup> *Id.* ¶ 19.

each single act of abuse in order to establish state responsibility. It is inadequate to claim that individual acts of rape and violence against women do not amount to torture under the CAT, as if such acts occur in a vacuum outside the context of state policies that perpetuate discrimination and violence against women.<sup>26</sup>

It is worth noting that then-Special Rapporteur on Violence against Women, Yakin Ertürk, referencing the due diligence requirements set forth in the 1993 Declaration on the Elimination of Violence Against Women, pointed out that “the application of the due diligence standard, to date, has tended to be state-centric and limited to responding to violence when it occurs, largely neglecting the obligation to prevent and compensate and the responsibility of non-State actors.”<sup>27</sup> She argued that due diligence must be explored at “different levels of intervention: individual women, the community, the State and the transnational level,” and she has offered guidelines for each level of intervention.

Special Rapporteur on Torture, Manfred Nowak, also reached a similar conclusion in his 2010 report when, in the context of a discussion of privately inflicted harm, he addressed domestic violence and the fact that most states do not take “enough action . . . to protect women and children against ill-treatment by their husbands, partners or parents.” He concluded that “[b]y not acting with due diligence to protect victims of domestic violence . . . and similar practices, States may commit torture or cruel, inhuman or degrading treatment or punishment by acquiescence.”<sup>28</sup>

The CAT’s General Comment No. 2 and the practice of the Committee clearly agree with Nowak’s analysis.

#### RAPE AND TORTURE SINCE GENERAL COMMENT NO. 2 AT THE COMMITTEE AGAINST TORTURE

Almost five years have passed since the adoption of General Comment No. 2. In the section below, we examine how the Com-

<sup>26</sup> See Andrew Bytnes, *Article 2*, in *THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* 88 (Freeman, Chinkin, and Rudolf, eds., 2012).

<sup>27</sup> Special Rapporteur on Violence Against Women, its Causes and Consequences, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, the Due Diligence Standard as a Tool for the Elimination of Violence Against Women*, Econ. & Soc. Council, Comm. on Human Rights, U.N. Doc. E/CN.4/2006/61 (by Yakin Ertürk).

<sup>28</sup> Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *Report on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, U.N. General Assembly, U.N. Doc. A/HRC/13/39, ¶ 62 (Feb 9, 2010) (by Manfred Nowak).

mittee has in fact addressed issues of rape and violence against women.

To begin with, the Committee has substantially expanded its sensitivity to and awareness of the issue of violence against women, and rape in particular. Today, it routinely addresses the subject in its concluding observations following examinations of individual country reports. Indeed, the Committee has also embedded the concept of rape as torture in its ongoing work, procedurally. States are commonly asked for data on such cases and particularly about the measures taken with respect to their investigation, prosecution, and any relevant punishment or redress. During the oral review, such questions are commonplace, often extending to legislative issues such as criminalization of marital rape, exculpatory punishments when perpetrators marry their victims, amnesty laws, etc.

A review of the Committee's concluding observations on country reports reveals that the Committee has referred to the issue of rape in at least forty-six cases it has reviewed between 2002 and 2011. The number of such cases in which rape is referenced expanded substantially following the beginning of the Committee's serious discussion of these issues during the consideration of the draft of General Comment No. 2 in 2006, and even more so after its adoption in 2007. Specifically, rape was mentioned in three Committee conclusions between 2002 and 2005.<sup>29</sup> Between 2006 and the end of 2007, when the General Comment No. 2 was adopted, rape was cited in conclusions concerning twelve states.<sup>30</sup> Since then and through the end of 2011, thirty-one countries examined have had issues related to rape mentioned in Committee conclusions following the adoption of General Comment No. 2.<sup>31</sup>

Furthermore, an examination of the concluding observations and recommendations of the Committee Against Torture reveals that the issues raised, including simply those concerned with rape, are themselves quite varied and have changed in scope.

Prior to 2006, the Committee referenced rape very rarely in its conclusions and observations. In 2002, the only mention of rape in Committee concluding comments was a reference after Spain's review to concern over "[c]omplaints concerning the treatment of

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<sup>29</sup> Spain, Colombia, and Finland.

<sup>30</sup> United States, Rep. of Korea, Peru, Togo, Guyana, South Africa, Mexico, Burundi, Poland, Japan, Benin, and Latvia.

<sup>31</sup> Algeria, Macedonia, Zambia, Indonesia, Iceland, China, Kazakhstan, Kenya, Nicaragua, Philippines, Chad, El Salvador, Yemen, Moldova, Cameroon, Mongolia, Syria, Jordan, Ethiopia, Cambodia, Turkey, Bosnia, Madagascar, Finland, Morocco, Sri Lanka, Mauritius, Ghana, Belarus, Turkmenistan, and Bulgaria.

immigrants, including sexual abuses and rape” and, in this context, further concern about the particular importance the Committee attached to the incomplete definition of torture in Spain’s penal code, which lacked reference to such acts when “based on discrimination of any kind.”<sup>32</sup> Similarly, in the 2003 review of Colombia, the Committee expressed concern over “allegations and information indicating . . . inadequate protection against rape and other forms of sexual violence allegedly frequently used as a form of torture or ill-treatment.” While recommending that Colombia investigate, prosecute, and punish those responsible for rape and sexual violence, the Committee made a special point of mentioning that this occurs “in the framework of operations against illegal armed groups,”<sup>33</sup> strongly suggesting that the practice was attributable to government agents. In 2005, there was a positive reference to Finland’s laws aiding victims of torture and rape, but nothing more.

It was not until 2006 that the Committee addressed reports of rape more frequently, referencing rape in the conclusions of at least forty-three country compliance reviews since then. The concerns ranged from rape in detention, armed conflict, or at the hands of public or law enforcement officials, to the need for preventive measures to address and correct laws that inadequately protect against rape. States parties have been advised to amend the definitions in their laws and to criminalize rape including marital rape, and to address issues of consent and more.

Reports of rape in war, peacetime, police operations, or ordinary life were cited by the Committee in conclusions on fifteen countries.<sup>34</sup> Some recommendations focused on rape in detention. At least eleven countries have been criticized for reports of rape by state agents, including law enforcement and police officers. These include Colombia, Togo, Mexico, Japan, Indonesia, Kazakhstan, Kenya, Philippines, Ethiopia, Chad, and Turkey.

While many Committee country conclusions also criticize vio-

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<sup>32</sup> Report of the Comm. Against Torture, 29th Sess., Nov. 11–22, 2002, 30th Sess., Apr. 28–May 16, 2003, U.N. Doc A/58/44, ¶ 61; GAOR 58th Sess., Supp. No. 44 (2004).

<sup>33</sup> Annual Report of the Comm. Against Torture, 31st Sess., Nov. 10–21, 2003, 32d Sess., May 3–21, 2004, U.N. Doc A/59/44, ¶ 68(d); GAOR 59th Sess., Supp. No. 44 (2004).

<sup>34</sup> Countries include Burundi (systematic use of rape as a weapon of war), Chad (criticizing government agents, armed forces, and allies of the government for rape and citing incidents at internally displaced person camps, refugee camps, and impunity), Indonesia (by military personnel), and Mexico (in police operations), as well as Cambodia, Turkey, Mongolia, Sri Lanka, Bulgaria, El Salvador, Zambia, Benin, Ethiopia, Morocco, and South Africa.

lence against women in general, which involves non-state actors, only a few criticize rape per se by non-state actors. The latter cases appear to involve armed groups: Algeria, where hundreds were raped by members of armed groups, and no investigations or prosecutions followed; Chad, where rapes were reportedly perpetrated by militias, armed groups, and forces of others; and Syria, where reports, based on the reports of other international bodies, also identified sexual violence by public officials.

Other recommendations also address rape, sometimes in the context of domestic violence and sometimes more broadly. Since 2006, the Committee has asked eleven states to criminalize marital rape, which is perpetrated by non-state actors.<sup>35</sup> In others, such as Jordan and Syria, the Committee has demanded an end to exculpatory provisions in law that permit rape charges against the perpetrator to be dropped if he marries his victim. Four countries were criticized for their abortion laws, three of which forbid abortion in all circumstances, specifically including rape. Five countries were asked for data on rape incidents in their states; two were advised to train their officials to address such cases.

As can be seen, there are already a sizable number of states being scrutinized regarding their compliance with the CAT's provisions calling for humane treatment and with regard to the issue of rape.

#### INDIVIDUAL COMMUNICATIONS

The Committee Against Torture has examined some communications in which the matter of rape featured prominently. One of these was *V.L. vs. Switzerland* in 2005,<sup>36</sup> involving a Belarusian woman and incidents she experienced with local police in Belarus.<sup>37</sup>

The Committee has examined individual cases, in some of which there were violations of article 3, which prohibits returning a person to a country if he or she faces a risk of torture involving rape. The key to the examination of these cases insofar as they address rape and gender violence seems to reflect the significant rea-

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<sup>35</sup> Countries encouraged to criminalize marital rape have included Rep. of Korea, Benin, Latvia, Zambia, Cameroon, Syria, Ethiopia, Cambodia, Mongolia, China, and Bulgaria.

<sup>36</sup> Comm. Against Torture, *V. L. v. Switzerland*, Communication 262/2005, U.N. Doc. CAT/C/37/D/262/2005 (Nov. 20, 2006).

<sup>37</sup> See generally Katharine Fortin, Comment, *Rape as Torture: An Evaluation of the Committee Against Torture's Attitude to Sexual Violence*, 4 *UTRECHT L. REV.* 145 (2008) (assessing this decision and how it demonstrates changes in the Committee's approach to the subject).

soning and decision in *V.L. v. Switzerland*, which directly addressed the public-private distinction and discussed the gendered nature of the Convention. Further examined in *V.L. v. Switzerland* was the role of non-state actors in threatening torture, the location of torture, and the prohibited purpose of the act(s) of torture.

In the following two cases, where violations of article 3 were found, the issue arose of return to a country where rape was prevalent and conducted by non-state actors as well as state actors. In these cases, the Committee found a risk of return to torture.

In *Bakatu-Bia v. Sweden*,<sup>38</sup> the complainant claimed that she would be imprisoned and tortured if returned to the Democratic Republic of the Congo (“DRC”) in violation of article 3 of the Convention, since she had been arrested and, while in detention, had been subjected to torture, beatings, and multiple rapes, due to her religious and political activities. The Committee noted the claims and evidence submitted by the complainant, the arguments of the State party, as well as the recent reports by seven U.N. experts and by the U.N. High Commissioner for Human Rights on the human rights situation in the country. In the light of the information before it, the Committee Against Torture considered that it was impossible to identify particular areas of the country that could be considered safe for the complainant. After having taken into account all the factors relevant for its assessment under article 3 of the Convention, and considering that the complainant’s account of events was consistent with the Committee’s knowledge about the present human rights situation in the DRC, the Committee concluded that substantial grounds existed for believing that the complainant was at risk of being subjected to torture if returned to the DRC. As noted, the Committee found a violation of article 3 of the CAT.

In *Njamba and Balikosa v. Sweden*,<sup>39</sup> the two complainants, mother and daughter, fled to Sweden from the DRC after discovering that all the rest of the family was murdered. The applicants claim, inter alia, that if they were returned to the DRC they would be subject to rape and sexual exploitation by DRC security forces. Sweden did not agree that the applicants’ fear of torture was convincing. However, the Committee decided against Sweden’s position, citing human rights reports that sexual violence was very

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<sup>38</sup> Comm. Against Torture, *Bakatu-Bia v. Sweden*, Communication 379/2009, U.N. Doc. CAT/C/46/D/379/2009 (Jun. 3, 2011).

<sup>39</sup> Comm. Against Torture, *Njamba and Balikosa v. Sweden*, Communication 322/2007, U.N. Doc. CAT/C/44/D/322/2007 (May 14, 2010).

common in all the provinces in the DRC, and that there are substantial grounds to fear that these applicants will be subject to such violence, recognizing rape as a form of violence against women where the state had failed to exercise due diligence to prevent its perpetration by non-state actors.

#### LESSONS LEARNED AND THE FUTURE

1. *Encouraging more awareness of CAT's General Comment No. 2*

Almost four years after the publication of General Comment No. 2, the significance of the comment and its potential for international and national advocacy and scholarship remains underdeveloped. The U.N. does not undertake to disseminate such documents (other than post them on the website and refer to them in documents) in a way that brings them home to those who need them badly and would be most likely to use them.

NGOs and complainants should engage more with the Committee on this, using the various procedures available under the CAT.

2. *Continuing monitoring and interventions regarding gender and torture*

More work clearly needs to be pursued to assist monitoring and intervention regarding gender-based violence. Despite the groundbreaking developments in understanding sexual and gender-based violence as torture, there is still much work to be done to ensure that the torture framework is both used and respected. This is critically important as it ensures that rape and other gender violence will remain as one of the gravest human rights violations having preemptory or *jus cogens* status. There is an obvious need to continue the practice of lodging complaints in such cases or developing appropriate new approaches as the need arises.

Addressing this issue in the context of torture has yet another utility, as attested to by rape and domestic violence survivors, because this approach transfers the burden of responsibility and shame to the perpetrator and away from the victim. In this way, it further helps to transform cultural understanding and practical prevention of such violence. Monitoring and lodging legal complaints through international bodies such as the Committee further demands that the state meet its due diligence obligations to prevent, investigate, prosecute, and redress such forms of torture.



3. *Seeking greater efforts to ensure the state meets due diligence obligations to prevent, investigate, punish, and redress acts of rape by private actors in violation of the CAT*

This final point, of course, is discussed earlier in this Article. But it merits repetition one last time, if only because Rhonda Copelon would have wanted us to add it to reemphasize the importance of concentrating legal skills and submissions on this subject.